Comment Info: ==========

General Comment:The membership of the Florida Forestry Association strongly urges the Department of Labor to certify Farm Labor Contractors for H2A visas to perform reforestation work as an agricultural pursuit. We strongly believe that this certification would be consistent with, and is supported by, the definitions of agriculture contained in the Fair Labor Standards Act, the Internal Revenue Code, and the Migrant and Seasonal Agricultural Workers Protection Act.

We believe that the Department of Labor has wrongly classified reforestation labor as being solely eligible for H2B, non-agricultural, seasonal worker visas. It is clear that there are circumstances where reforestation workers are agricultural workers under existing law and current regulations. The Department of Labor should recognize these circumstances and allow such workers to be eligible for H2A visas.

As we are sure you are aware, the Fair Labor Standards Act in 29 USC 203(f) defines agriculture to ?include farming in all its branches and among other things includes the cultivation and tillage of the soil?, and any practices (including forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations ??. The Bureau of Labor Statistics defines farmers in its Standard Occupational Classification System (OES/SOC 11-9012) as those who ?On an ownership or rental basis, operate farms, ranches, greenhouses, nurseries, timber tracts, or other agricultural production establishments?? Webster?s defines a farm as a tract of land devoted to agricultural purposes. Cultivating means to loosen or break up the soil about growing plants. The act of planting a tree involves breaking up and loosening the soil about the seedling to allow the root system to be inserted into the ground.

Employees performing reforestation activities that are the same as those performed by farm workers on a farm or for a farmer should be classified as agricultural workers for H2A purposes. The qualifying reforestation activities should include planting, weed control, herbicide applications, and other unskilled, nonprofessional, manual labor tasks that have to do with preparing the site and cultivating the soil. The workers who perform these reforestation-related tasks deserve the same consideration for H2A visas as do workers who perform the same or similar tasks in cultivating other agricultural and horticultural commodities on many of the same farms.

Workers performing reforestation tasks for farmers or on farms are clearly agricultural employees under the Fair Labor Standards Act. We are disappointed that the Department of Labor fails to recognize this definition for purposes of classifying H2A eligible employers and respectfully request that the Department of Labor reevaluate its position and issue new regulations allowing H2A visas to be issued to qualifying reforestation workers. There should not be separate, conflicting categories for workers that prepare sites and cultivate soil for vegetable planting and workers that prepare sites and cultivate soil for tree seedling planting.

In its Training and Employment Guidance Letter 27-06 the Department officially takes the position that Fair Labor Standards does not classify forestry as agriculture -- ?? although the occupations of Tree Planter, Forest Worker and Laborer, and Brush Clearer have many similarities to agriculture, they are not so classified under either the

Internal Revenue Code or
the Fair Labor Standards Act (FLSA). Therefore, under the Immigration and Nationality Act, they
are not authorized for the H2A visa and must be processed as H2B occupations.? The TEGL
fails to consider the exception allowed under FLSA. That is, that when forestry work is
performed on farms or for farmers it is, by FLSA?s definition, clearly agriculture.

It follows then that the Department must be basing the TEGL procedures solely on its
interpretation of the Internal Revenue Code, as spelled out in 26 USC 3121(g)(1), that defines
Agricultural Labor as ?? on a farm, in the employ of any person, in connection with cultivating
the soil, or in connection with raising or harvesting any agricultural or horticultural commodity??
But, again, we find that even the IRS language supports our position. These reforestation tasks
are being performed on farms, in connection with cultivating the soil. The tasks of digging,
planting, weeding, and spraying are by definition, cultivating the soil. Again, the Department of
Labor fails to recognize the caveats in the definition outlined under current law, this time it is the
IRS Code that would permit reforestation workers to be classified as agricultural workers and
eligible for H2A visas.

Other sections of the Internal Revenue Code, although not directed specifically to agricultural
labor, also include timber operations under the definition of ?farming,? and therefore support our
request. For example, Section 2032 A (e) (4) defines the term ?farm? to include ??.woodlands?.
Section 2032 A (e) (5) (c) defines the term ?farming purposes? to include ?the planting? of trees?.
The instructions for IRS Schedule F (farming) of Form 1040 stipulate that the form is to be used
by sole proprietor farmers, including those who grow timber and produce forest products.
Therefore, under both FLSA and the Internal Revenue Code, when reforestation tasks involved in
cultivating the soil take place on a farm or for a farmer, such tasks should reasonably be defined
as agriculture, and therefore eligible for the H2A visa program.

Employers of reforestation workers that come to the U.S. to work on H2B visas often find
themselves having to comply with the laws and regulations surrounding H2A visas. This only
lends further support for reclassifying reforestation workers. For example, DOL has enforced the
Migrant and Seasonal Agricultural Workers Protection Act, 29 USC 1801-1803, with respect to
the reforestation business for almost 20 years. The original reason for enforcement was based
on the 9th Circuit Court of Appeals decision in Bresgal v. Brock, which held that forestry was
agriculture for the purposes of the Act because the Internal Revenue Code (26 USC 3121(g))
includes in its definition of Agricultural Labor ??the handling, planting, drying, packing,
packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or
horticultural commodity in its unmanufactured state.? The Bresgal decision further states that ??
forestry workers who raise trees as a crop for harvest are engaged in agricultural employment??
The Court found it was ?inconceivable that Congress intended to protect workers planting fruit
trees in an orchard, and to disregard workers planting fir trees on a hillside??

In fact tree planters are specifically mentioned in the record of the Congressional Committee that
amended the agricultural labor law in 1974. The Court also interpreted the law to define
reforestation as agriculture even when not done on a farm; and DOL has thus been enforcing
MSPA as such, on farms, on industrial timberlands, and public forestland, ever since. We fail to

understand how the Department of Labor can justify using this Internal Revenue Code section as a basis for denying that reforestation is agriculture for the purposes of H2A visas, and at the same time, use the very same section of the very same law to define reforestation activities as agriculture to enforce MSPA. This latter interpretation is particularly inconsistent if the reforestation activity is taking place on a farm or for a farmer as outlined under FLSA.

As a result of being bound by the Bresgal decision, forestry contractors comply with other federal farming regulations. All forestry contractors engaged in reforestation must be registered Farm Labor Contractors. They must adhere to all of the same agricultural employer regulations as Farm Labor Contractors engaged in more traditional agricultural activities. DOL enforces the OSHA Field Sanitation Standards for agriculture, 29 CFR 1928.11, with respect to reforestation contractors by using the same premise ? i.e., that the simple act of planting trees is agriculture. Reforestation contractors have all the responsibilities set out by the agriculture regulations but are being denied the benefits of access to agricultural labor with H2A visas.

Other federal agencies currently recognize reforestation as agriculture. Farmers are eligible for federal agricultural cost sharing for reforestation under 7 USC 1724(a) (2). The Natural Resources Conservation Service supplies technical assistance to private landowners under 7 CFR 610.26 to ?improve all agricultural lands, including cropland, forestland, and grazing lands?? The list of federal laws and regulations that co-mingle reforestation and agriculture goes on and on.

Other evidence that reforestation workers should be certified for H2A visas can be found when looking at similar industries that are already using the H2A visa category. Forestry nurseries are currently eligible for H2A visas. These workers cultivate the soil, plant the seed, spray the weeds, and lift and pack the tree seedlings for shipment. These same nursery workers are also often used to plant the nursery stock in reforestation activities away from the nursery site when the nursery itself, or its Farm Labor Contractor, is also acting as the reforestation contractor. It makes no sense to permit an H2A worker to plant a tree in a nursery, tend to it until it can be used for reforestation, and then replant it in the forest but not allow other workers access to H2A visas because they only plant the seedlings in the forest and did not work in the nursery.

In consideration of the above, we respectfully request that the Department of Labor amend its procedures to allow reforestation workers to be eligible for H2A visas. This should be allowed when the work is being performed on a farm, or for a farmer, as outlined above, in order to stay within current Fair Labor Standards Act guidelines. The reforestation work obviously must be performed by a registered Farm Labor Contractor to stay within the Migrant and Seasonal Agricultural Worker Protection Act regulations. The reforestation work must also involve cultivating the soil as outlined in the Internal Revenue Code. If all of these criteria are met in the ETA-750 application, the Department of Labor should certify the applicant for an H2A visa. All three of the legal and regulatory criteria are met under the following circumstances:

1. The reforestation takes place on a farm or for a farmer. That would be on private, non-industrial property used primarily for agricultural purposes, including timber tracts. This would not include publicly owned timberland, or industrial property,

**2. The reforestation must involve cultivating the soil. This would include planting, weeding,
fertilizing, and brush control. It must be agricultural in nature.
3. The work must be performed by the farmer himself or by a Farm Labor Contractor if for hire.**

**We respectfully request that the Department of Labor modify its guidelines for processing and
approving H2A labor certification applications to include reforestation as outlined above. Thank
you for your prompt consideration of this matter.**